LEE BEE SOON & ORS. v. MALAYSIA NATIONAL INSURANCE SDN. BHD.

[O.C.J. (Yusoff J.) April 11, 1980]
[Kuching — Civil Suit No. K. 146 of 1974]

Insurance — Marine insurance — Second policy — Whether renewal of first policy — Failure by insured to disclose type of cargo carried by vessel — Whether this amounted to non-disclosure so as to vitiate policy — Burden of proof on underwriters.

Shipping Law — Marine insurance — Sinking of vessel — Effect of failure to disclose type of cargo carried by vessel — Whether plaintiffs could claim under policy.

The plaintiffs in this case claimed for a sum of $80,000 as money due under Hull Insurance policy dated May 29, 1972 from the defendants, the insurers, in respect of a motor-vessel. The said vessel sank in bad weather in Sarawak waters. At the material time when the vessel sank, it carried a cargo of sand and stones.

The facts reveal that on December 7, 1971, the plaintiffs signed a proposal form seeking insurance for his vessel for period of one year between December 11, 1971 to December 10, 1972. The plaintiffs had represented that the vessel was a "Cargo-passenger carrying vessel" and that it carried "Sundry goods". On December 9, 1971, a policy was issued by the defendants. On December 14, 1971 the defendants amended the policy by reducing the period covered to six months expiring on June 10, 1972.

On May 29, 1972 before the policy expired the plaintiffs sought another insurance from another source. The agent, however, gave them coverage from the same insurers, the defendants, for the period of June 11 to December 10, 1972, insuring the Hull and equipment for $50,000 and machinery and boilers for $30,000. The defendants repudiated liability under this policy and contended that it was not effective because of misrepresentation and non-disclosure of material facts in the proposal form which rendered the policy void.

Held, allowing the plaintiffs' claim: (1) in alleging misrepresentation as a defence, the burden of proof lies on the insurers and the misrepresentation relied on must be established clearly;

(2) in order to ensure compliance with any representation made by the assured, the insurer should take care that the representation is inserted into the policy and thus be converted into a warranty;

(3) the proposal form was not part of the second policy and could not form the basis of the contract; the representation in the proposal form relating to the carriage of cargo could not be admissible to the defendants as a basis of warranty;

(4) the law is, where underwriters allege non-disclosure, they must adduce evidence in support of their plea. Such course was not followed in this case;

(5) the duty of the assured to disclose all material facts to the insurers must be done before the contract is concluded. The object of disclosure being to inform the underwriter of matters immediately under his consideration, with reference to the taking or refusing of a risk then offered to him, it would be going beyond the principle to say that each and every change in an insurance contract created an occasion on which a general disclosure becomes obligatory.

Cases referred to:-

(1) *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* [1891] A.C. 485.

(2) *Williams* v. *Atlantic Association Co. Ltd.* [1933] 1 K.B. 81.

(3) *Cory* v. *Patton* (1874) L.R. 9 Q.B. 577.

(4) *Willmott* v. *General Accident Fire and Life Assurance Corporation Ltd.* (1935) 53 Ll. L. Rep. 156.

(5) *Niger Co. Ltd.* v. *Guardian Assurance Co. Ltd.* (1922) 13 Ll. L. Rep. 75, 82.

CIVIL SUIT.

Chew Pok Oi for the plaintiffs.

Peter Yip for the defendants.

Cur. Adv. Vult.

Yusoff J.: Plaintiffs, the assured, claim for a sum of $80,000 as money due under Hull Insurance policy dated May 29, 1972 issued by the defendants' company, the insurers, in respect of motor-vessel "Lee Chong" owned by the plaintiffs. The vessel sank in bad weather on December 9, 1972, near Bintulu, in Sarawak waters. At the material time when the vessel sank, it carried a cargo of sands and stones.

The defendants had repudiated liability. They contended that the policy was not effective because of misrepresentation and non-disclosure of material facts in the proposal form which rendered the policy void.

The facts are these. On December 7, 1971 the plaintiffs signed a proposal form (page 1 of Exhibit P1) seeking insurance for his vessel for period of one year between December 11, 1971 to December 10, 1972. In answer to a question in the form relating to work engaged upon and nature of cargo carried, the plaintiffs represented that it was "Cargo-passenger carrying vessel. Sundry goods." On December 9, 1971 a policy No. HL/8053/KU was issued by the defendants (page 3 of Exhibit P1). On December 14, 1971 the defendants amended the policy by reducing the period covered to six months expiring on June 10, 1972 (page 4 of Exhibit P1).

On May 29, 1972 before the policy expired the plaintiffs sought another insurance from another source but the agent gave them coverage from the same insurers, the defendants, for the period of June 11 to December 10, 1972, (Exhibit P9), insuring the Hull and equipment for $50,000 and machinery and boilers for $30,000.

Firstly, in alleging misrepresentation as a defence, the burden of proof lies on the insurers and the misrepresentation relied on must be established clearly — see *Davies* v. *National Fire and Marine Insurance Co. of New Zealand.*[1]

When relying on this defence, it was the defendants' case that the proposal form attached to the second policy by reason that the policy was a renewal of the first policy dated December 9, 1971: that the plaintiffs had misrepresented the nature of cargo to be carried on the vessel and that being a warranty created in favour of the defendants, the breach of which at the time of sinking caused the policy to come to an end. By these reasons the defendants contended that they were entitled to avoid the contract.

It is a contentious matter whether the second policy dated May 29, 1972 was a renewal of the first policy. The first policy itself does not expressly stipulate on renewal. *Ivamy* on General Principles of Insurance Law 3rd Ed. at page 231 states:

"Where the policy is silent on the question of renewal, any renewal is probably a new contract."

On this issue, the defendants' manager (DW1) himself admitted that the second policy was a different contract from the first and there were the difference of additional warranties attached to the second policy. For these reasons, in my view, the proposal form was not part of the second policy and could not form the basis of the contract.

The remaining question is whether a representation made to the first underwriter, should it proved to be untrue and material, is available to enable subsequent underwriters to avoid the contract. *Ivamy* on Marine Insurance 2nd Ed. at page 79 states:

"There is no modern reported case in which the rule that a representation made to the first underwriter is available to subsequent underwriters, and no reference is made to any such rule in the Marine Insurance Act, 1906."

Having regard to these circumstances, in my opinion, the representation in the proposal form relating to the carriage of cargo could not be admissible to the defendants as a basis of warranty. Further, section 35(2) of the Marine Insurance Act, 1906 provides that:

"Any express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy."

It has been held that a representation does not become a warranty. In order to ensure compliance with any representation made by the assured, the insurer should take care that the representation is inserted into the policy and thus be converted into a warranty — see *Ivamy,* Marine Insurance 2nd Ed. page 302.

Secondly, in alleging non-disclosure, the defendants state in their statement of defence that the plaintiffs failed to disclose that the cargo to be carried in the vessel was stones and sands.

The law is, where underwriters allege non-disclosure, they must adduce evidence in support of their plea. In *Williams* v. *Atlantic Association Co. Ltd.*,[2] Scrutton L.J. said:

"The underwriters have not taken the course, which in my view should always be pursued, of going to the box and saying what they knew and what was the material fact which they did not know. In my view an underwriter pleading concealment must come and say what he was or was not told."

In the present case, such course was not followed. The defendants' witness, DW1, did not know and the former manager who dealt with the policy was not called to give evidence in support of the plea. The defendant merely sought to rely on the proposal form which in my view, I have earlier decided that it was not part of the second and current policy and therefore there was no non-disclosure of material facts arises.

But even assuming that the proposal form was attached to the current policy and granted that insurance is a contract *uberrimae fidei* and that the assured is under a duty to disclose all material facts relating to the insurance which he proposes to effect, the law as provided in section 21 of the Marine Insurance Act, 1906, is:

"A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted reference may be made to the slip or covering note or other customary memorandum of the contract. . . ."

In this sense, the duty of the assured to disclose all material facts to the insurers must be done before the contract is concluded. Hence, if everything material be communicated up to the time of initialling of the 'slip' (or proposal) by the underwriter, but something material arising between that time and the time of executing the policy is not communicated, there is no non-disclosure so as to vitiate the policy — see *Cory* v. *Patton;*[3] *Ivamy* Marine Insurance 2nd Ed. page 67.

The plaintiffs' counsel conceded that the representation was material fact and that stones and sands were not sundry goods but bulk cargo. Plaintiffs also gave evidence that throughout 1971 to September 1972 the vessel carried sundry goods. It carried stones and sands only from September 15 onwards. He produced invoices and cargo manifests to prove these, (Exhibits P4 to P6). When cross-examined he said that it was difficult for him to say that he did not intend to carry stones and sands when he sent in his proposal form. It did not occur to him at the time. He contended that there was a change of plan, and the carriage of stones and sands was not prohibited by the contract.

In *Willmott* v. *General Accident Fire and Life Assurance Corporation, Ltd.*[4] Branson J. held at page 159:

"They cannot complain, if the answer was true at the time it was given, because a subsequent change of plans, which is not prohibited by the contract into which he has entered, has not prevented him from keeping her not infrequently, or indeed very often, at another and less safe mooring."

In *Niger Co. Ltd.* v. *Guardian Assurance Co. Ltd.*[5] Lord Buckmaster said:

"There remains the question of non-disclosure. The object of disclosure being to inform the underwriter's mind on matters immediately under his consideration, with reference to the taking or refusing of a risk then offered to him, I think it would be going beyond the principle to say that each and every change in an insurance contract creates an occasion on which a general disclosure becomes obligatory, merely because the altered contract is not the unaltered contract, and therefore the alteration is a transaction as the result of which a new contract of insurance comes into existence. This would turn what is an indispensable shield for the underwriter into an engine of oppression against the assured. The authority of *Lishman's case, sup,* is against such a contention and I think it ought to be followed."

I have but to adopt what his Lordship has said in the *Niger's* case and for these reasons the plaintiffs are entitled to judgment. The quantum has not been disputed. Judgment is entered for the plaintiffs as prayed and costs.

Claim allowed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Chong Brothers.*